PEMBINAAN SPK SDN BHD v. JALINAN WAJA SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
AZIAH ALI JCA
MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: W-02-1798-2011]
11 OCTOBER 2013

CONTRACT: *Quantum meruit – Agreement – Breach of – Claim for special and general damages – Whether trial court dismissed main claim but allowed damages to be assessed on quantum meruit basis – Appeal against decision – Claim for quantum meruit not pleaded – Reliance on omnibus prayer for further and other reliefs – Whether resort to omnibus prayer would only make sense where main claim not dismissed – Whether trial court's decision based on implied terms in contract – Whether evidence led to secure claim for quantum meruit – Whether s. 71 Contracts Act 1950 invoked – Whether parties bound by contractual provisions – Whether decision of trial court justified*

CIVIL PROCEDURE: *Pleadings – Failure to plead – Breach of agreement – Claim for special and general damages – Whether trial court dismissed main claim but allowed damages to be assessed on quantum meruit basis – Appeal against decision – Claim for quantum meruit not pleaded – Whether trial court had function to improve case for contracting parties – Reliance on omnibus prayer for further and other reliefs – Whether reliance on omnibus prayer for further and other reliefs would only make sense where main claim not dismissed – Whether trial court's decision based on implied terms in contract – Whether evidence led to secure claim for quantum meruit – Whether parties bound by contractual provisions – Whether decision of trial court justified – Janagi v. Ong Boon Kiat*

CIVIL PROCEDURE: *Appeal – Decision of trial judge – Whether set aside – Breach of agreement – Claim for special and general damages – Trial court dismissed main claim but allowed damages to be assessed on quantum meruit basis – Claim for quantum meruit not pleaded – Whether trial court had function to improve case for contracting parties – Whether decision of trial court justified*

The respondent/plaintiff and the appellant/defendant entered into a co-operation agreement ('the agreement') whereby the respondent and another party known as Trident Water Pty Ltd agreed to assist the appellant to tender for a project in Putrajaya. The aim of the agreement was to ensure that the appellant would be awarded the project. *Vide* cl. 2.1 of the agreement, the parties agreed that the appellant would enter into a further agreement with the respondent to appoint the latter as the process designer for the project upon securing the said project. Clause 10 of the agreement provided that each party would bear its own costs and expenses incurred in connection with the preparation and submission of pre-qualification and/or the submission in respect of the project and any subsequent negotiations up

to the date of the execution of the agreement referred to in cl. 2.1. The respondent, on its part, asserted that it had contributed substantially, *inter alia*, in preparing the drawings, plans, design and specifications for the project. The respondent maintained that the appellant relied on these factors when it bid for the project which was ultimately secured by it. Disputes arose when the appellant appointed other parties as the process designer for the project and no subsequent agreement was entered into by the appellant and the respondent. In the High Court, the respondent claimed that the appellant had breached the agreement and prayed for special and general damages. The claim was, however, dismissed and the trial court held, *inter alia*, that (i) the respondent made a commercial offer to the appellant for the respondent to be appointed as the process designer but the parties disagreed on the pricing; and (ii) the parties were still negotiating to enter into a post award agreement but the process proved to be unsuccessful. The trial judge ordered that damages be assessed by the Registrar on a *quantum meruit* basis in favour of the respondent where works had been done and costs had been incurred. The said order was made based on an omnibus prayer in the statement of claim, *ie*, 'the claim for further and other reliefs'. It was further decided that (a) the court could imply a term in the agreement that the parties must have intended the respondent to be reimbursed for all its costs and expenses in the submission of the tender for the benefit of the appellant; and (ii) even if a claim under *quantum meruit* and the implied terms were not available, the court could still order for compensation under s. 71 of the Contracts Act 1950 ('s. 71'). Dissatisfied, the appellant appealed to this court. It was argued that the relief on a *quantum meruit* basis could not be granted since it was not pleaded. Further, the trial judge had dismissed an earlier oral application by the respondent to amend its claim at the close of the trial to fortify its claim for special damages but yet, the court allowed a claim for *quantum meruit*. The issue that arose for consideration was whether the trial judge was correct to have ordered damages on the *quantum meruit* basis.

Held (allowing appeal with costs; setting aside decision of the High Court)
Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

(1) It is not the duty of the court to make a case for a party when that party did not raise, or wish to raise a point in the litigation. On the facts, the plaintiff's case was wholly grounded on a claim for special and general damages for breach of the agreement. The *quantum meruit* claim was never expressly pleaded and was never part of the agreed facts or agreed issues. A decision based on an unpleaded case will, as a rule, occasion in a failure of natural justice and will be liable to be set aside on appeal. It denies the litigant the right to present his case fully before the judge on the unpleaded issue before the decision is made by the court (*Janagi v. Ong Boon Kiat*; refd). (paras 22 & 26)

(2) A claim for *quantum meruit* here related to more than a claim based on the legal effects of the pleaded material facts. It was a cause of action in itself which was substantive in nature and therefore, required express pleading and the adduction at trial of a sufficient foundation of facts derived from evidence tendered through witnesses' testimony or relevant, cogent documentary evidence. Further, resort to the omnibus prayer would only make sense where the main claim was not dismissed. On the facts, no evidence was led on the claim of *quantum meruit*, nor any evidence on the intention of the parties to support the inference of the implied term for reimbursement. (paras 10 & 27)

(3) There was no basis for s. 71 to be applied, especially in the face of clear contractual provisions which made the appointment of the respondent as process designer dependent on further agreement during the post award stage. Section 71 could not be interpreted as providing a relief which was not intended by the parties. (para 28)

(4) It is not the function of the courts to improve the case for the contracting parties. It is for a party such as the respondent to ensure by clear contractual provisions that its pre-award expenses and costs should be reimbursed or shares in whatever proportion it might think fair in the circumstances. It made a commercial decision by choice to agree to cls. 2.1 and 10 of the agreement and had to stand by it based on the principle of freedom of contract. (para 29)

Case(s) referred to:

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC ***(refd)***

Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***

Md Hamid Merican Abdul Kader Merican v. Abdul Razak Hussain & Ors [2010] 1 LNS 487 HC ***(refd)***

National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam) [2000] 1 CLJ 681 CA ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 71

For the appellant - T Kasinathan & Nurashikin Mansoor; M/s Affendi Zahari

For the respondent - Abu Bakar Jais & Abdullah Omar Wahbi Bawadi; M/s Hisham Sobri & Kadir

[Editor's note: For the High Court judgment, please see Jalinan Waja Sdn Bhd v. Pembinaan SPK Sdn Bhd [2011] 1 LNS 909 (overruled).]

Reported by Kumitha Abd Majid

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JUDGMENT

Mohamad Ariff Yusof JCA:

Introduction

[1] This was an appeal by the defendant from the decision of the High
B Court after a full trial whereby the learned Judicial Commissioner dismissed the plaintiff's claim for special and general damages, but nonetheless ordered that damages be assessed by the Registrar on a *quantum meruit* basis in what appeared to be an exercise of the court's discretion "to do justice to the party that deserves it though the pleadings may be less than elegantly worded". See
C pp. 38 and 39 of the grounds of judgment.

The Decision Of The High Court

[2] The claim for *quantum meruit* was not expressly pleaded and yet was ordered by the learned High Court, purportedly, as indicated above, to do
D justice between the parties. The learned Judicial Commissioner held:

> The Plaintiff's contribution in such a situation as anticipated ... where work had been done and costs incurred can be recognised and be claimed under *quantum meruit* ... Learned counsel ... was quick to object that such a relief cannot be granted because it was not pleaded. I need only say that
E one must go back to basics and it is this: the sole purpose of pleadings is so that no party would be taken by surprise. Here the Defendant is not taken by surprise because all the relevant facts justifying a claim for general and special damages have been pleaded. The bigger includes the smaller. Whilst the Court may not grant any general and special damages, the Court may still proceed to grant the "smaller" which is a claim on a
F *quantum meruit* basis. The words "*quantum meruit*" need not have been used if the facts justifying it are writ large in the whole claim ...
>
> We must not be so fixated to pleadings that we fail to see the wood for the trees ... (pp. 36-37 of the Grounds of Judgment).

[3] Appellant's counsel started his submission by informing the court that
G there was only one issue in this appeal, and that was whether the learned Judicial Commissioner was correct to have ordered damages on the *quantum meruit* basis. Counsel submitted the learned Judicial Commissioner erred in deciding on unpleaded issues. Aside from the *quantum meruit* issue in general, the learned Judicial Commissioner also accepted that the court could
H imply a term in the agreement that the parties must have intended the respondent was to be reimbursed for all its costs and expenses in the submission of the tender for the benefit of the appellant, and further that s. 71 of the Contracts Act 1950 would apply. Both issues were also not expressly pleaded.

I **[4]** The learned Judicial Commissioner in fact held:

> Even if a claim under *quantum meruit* and implied term is not available, this Court can also make compensation under section 71 of the Contracts Act 1950 ...

> Here the Plaintiff had done something lawful for the Defendant and it did not intend it to be done gratuitously and needless to say the Defendant had enjoyed the benefits of a RM163 million contract … (See p. 40 of the Grounds of Judgment)

Our Decision

[5] We agreed with the submission of the appellant and allowed the appeal with costs of RM10,000 to be paid by the respondent to the appellant. We further ordered the deposit to be refunded back to appellant.

[6] We found the learned Judicial Commissioner had decided based on an unpleaded claim. Indeed, there had been an earlier oral application by the respondent to amend its claim at the close of the trial to fortify its claim for special damages but that was dismissed by the High Court, given the lateness in the application. The substantive claim was dismissed, but yet the High Court allowed a claim for *quantum meruit*.

[7] The High Court had decided to order an assessment of damages by the Registrar based on an "omnibus" prayer in the statement of claim, ie, the claim for further and other relief, reflected in para. 18(g) of the statement of claim, reading: "Lain-lain perintah yang difikirkan wajar, sesuai dan manfaat oleh Mahkamah Yang Mulia ini". This, in our judgment, was an error in the circumstances of this case.

[8] The learned Judicial Commissioner also held that compensation could also be payable under s. 71 of the Contracts Act 1950, if the basis of *quantum merit* and implied terms was not available. As for incorporating implied terms, we also agreed with the appellant's submission that this too was not pleaded.

[9] The Judicial Commissioner, in the exercise of his discretion, had therefore misapplied fundamental rules of pleadings. The issue of *quantum meruit* was raised only after the full hearing of the witnesses ended, coming up only at the close of the trial when the learned Judicial Commissioner requested parties to raise it during submission.

[10] Thus, no evidence on the claim of *quantum meruit* was led, nor any evidence on the intention of the parties to support the inference of the implied term for reimbursement; the evidence led related to the respondent's claims for special and general damages, which were in fact dismissed by the learned judge, and, as earlier indicated, the oral application to amend to fortify the claim for special damages was dismissed by the court.

The Background Facts

[11] The respondent and the appellant had entered into a co-operation agreement dated 26 December 2006 whereby the respondent (and another party named as Trident Water Pty Ltd) would assist the appellant to tender for a project in Putrajaya described as the STP2 Module 2 Project. The aim was to ensure that the appellant would be awarded the project.

[12] According to the respondent, it had contributed substantially in this regard, having prepared the development proposal, drawings, plans, design, calculations, pricings, and specifications for the project. The respondent maintained the appellant had relied on these when bidding for the project which it ultimately secured. The learned Judicial Commissioner considered this and came to a conclusion that for the sake of justice and fairness it was proper to award damages based on a *quantum meruit* basis.

The Co-operation Agreement

[13] The co-operation agreement contained the following pertinent provisions in cls. 2.1 and 10:

> Clause 2.1
>
> The parties agree to collaborate on an exclusive basis and coordinate their efforts to assist PSPSK to secure the Award. When the Project is awarded to PSPK, PSPK will enter into further agreement(s) with JWSB and TW and to appoint JWSB/TW as the Process Designer for the Water and Wastewater Systems Facilities for the Project upon the terms and conditions therein contained.
>
> Clause 10
>
> Each party shall bear its own costs and expenses incurred in connection with the preparation and submission of pre-qualification documents and/or the submissions in respect of the Project and any subsequent negotiation up to the date of the execution of the agreement(s) referred to in Clause 2.1.

[14] On the facts, no subsequent agreement was entered into. Instead, the appellant appointed other parties as the process designer for the project. The High Court in fact alluded to this, finding that the respondent had, after the grant of the award, made a "commercial offer" to the appellant for the respondent to be appointed as the process designer, but the parties disagreed on pricing.

[15] It came out crystal clear in the judgment that parties were still negotiating to enter into a post-award agreement, but the process proved unsuccessful.

The Appellant's Arguments

[16] The position taken by the appellant in this appeal was no damages was payable since the co-operation agreement, as indicated in cl. 2.1, was merely an agreement to agree. There were thus two stages contemplated by the parties – pre-award and post-award stages. For the pre-award stage, each party was to bear its own cost, whereas for the post-award stage it depended on the further agreement to be entered between the parties, which did not materialise. On the evidence too, the respondent failed to prove the special

damages it claimed. PW2 for the respondent in fact admitted in his testimony (during cross-examination) that the respondent did not have any evidence to substantiate its claim for the special damages. See p. 120 of the appeal record, vol. 1 (Parts B and C):

> Q. All the losses in pages 28 - 31 in C - do you have the evidence?
>
> A. In the file there is no evidence.

[17] From the oral submissions and the written submission of the appellant, it appeared that the appellant took the position that *quantum meruit* was not part of the agreed issues to be tried, no material facts were introduced in evidence to support it, and it was not pleaded, being raised for the first time after the close of the parties' case. *Md Hamid Merican Abdul Kader Merican v. Abdul Razak Hussain & Ors* [2010] 1 LNS 487; [2010] 9 MLJ 1 and *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430; [2009] 6 MLJ 293 were referred to. A passage in *Pacific Industries*, *supra*, was particularly emphasised:

> The Court decides a case after considering the evidence adduced by each party and the documents produced by them. Neither party should be taken by surprise. Whether at first instance or at appellate level, judges rely heavily on submissions and authorities submitted by counsel. As a matter of professional etiquette, counsel is supposed to bring to the court's attention authorities which may even favour his opponent's case, though he may proceed to distinguish his case from such authorities. It is dangerous and not advisable for the Court, on its own accord, to consider a point without reliance on any pleadings or submissions by counsel. If a judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight those points to the parties before him. He must then give an opportunity for both parties to further submit on those particular points. Where a judge makes a decision on an issue that is not based on the pleadings and without hearing the parties on that issue, the judge would then be in breach of the legal maxim *audi alteram partem*.

[18] Citing the observation of the Federal Court in *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188, the appellant reinforced its submission of a major error on the part of the High Court. The Federal Court in that case held:

> ... we cannot agree with the rationale of the Court of Appeal on this issue. There is no evidence to support the proposition except an imagination drawn from, if we may say, a desire to play the part of a crusader to fight a cause in which it does not know who the villain is. There is a limit to how far a court should do so in the name of justice ...

The Respondent's Arguments

[19] For the respondent, counsel submitted that it was not disputed that work was done by the respondent in securing the award of the project for the appellant. The Judicial Commissioner had sufficiently explained the reasons

why he awarded damages to be assessed based on *quantum meruit*. It was argued in support of the High Court's decision that *quantum meruit* did not need to be expressly pleaded when the facts justifying it were "writ in the whole claim". In support of the argument, the following authorities were specifically advanced: *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10; *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681; *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9.

[20] Further, the Federal Court decision in *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190 was cited in support of the learned Judicial Commissioner's reliance on the omnibus prayer, as earlier referred to herein. Salleh Abas FCJ commented in the relevant passage of the judgment advanced before us:

> We cannot see how the Respondent should be deprived of his right by a purely technical error on the part of his solicitors, who were not up-to-date with this aspect of legal technicalities. In any case prayer (e) in para. (7), "Any other relief which this Honourable Court deem fit to grant" must not be treated as a mere ornament to pleadings devoid of any meaning ...

Our Evaluation

[21] The case before the High Court involved an odd situation. The High Court had in fact dismissed the claim for special and general damages after a full trial because these claims were not proven. *Quantum meruit* was described as being the lesser of these claims. Logically, if the greater was dismissed, the lesser must by right also fall. Of course, if material facts on a *quantum meruit* claim had been introduced, established, evaluated and accepted by the court, there could possibly be some room for argument, but this was not the case in this appeal. The learned Judicial Commissioner decided on his own accord to order damages to be assessed on the basis of *quantum meruit* for the sake of justice and fairness. Regrettably, in proceeding to act on his own accord, the learned Judicial Commissioner had perhaps downplayed another important component of practical justice in hearing cases before the court, and that concerned the maxim "*audi alteram partem*".

[22] To decide on an unpleaded claim is to deny the opposing party the valuable right to answer the claim by adducing such material facts at the trial as it might find necessary to forward to the court to advance its case against the claim. On the facts of this appeal, however, the problem was compounded by the absence of supporting material facts in relation to a *quantum meruit* claim. This claim was never expressly pleaded and was never part of the agreed facts or agreed issues. It never figured even in the summary of the plaintiff's case. The plaintiff's case was wholly grounded on a claim for special and general damages for breach of the co-operation agreement. To quote the plaintiff in its "Ringkasan Kes Plaintif":

2. Secara umumnya, tuntutan Plaintif terhadap Defendan adalah meliputi ganti rugi khas berjumlah RM6,971,246.50, ganti rugi am, ganti rugi sampingan (consequential), ganti rugi kerosakan reputasi, faedah dan kos akibat daripada kemungkiran kontrak/perjanjian oleh Defendan ...

7. Plaintif akan menunjukkan kepada Mahkamah butir-butir kerugian, kehilangan dan jumlah yang terlibat sama ada dalam bentuk khas, am, sampingan dan kerosakan reputasi, yang telah dialami oleh Plaintif sewaktu perbicaraan nanti ...

[23] In such a situation, a return to the basic governing principles and rules of pleadings in our system of civil litigation will be timely and appropriate. This was also the route adopted by the learned Judicial Commissioner, but, with the utmost respect, his conclusions resulted from a misapplication of these basic principles. The law reports are repleted with exhortations and reminders by judges on the need for decisions to be grounded on the pleaded case of the litigants, whether plaintiff or defendant. The need to comply with the rules on pleading are generally to be strictly enforced to avoid surprises at the trial and to narrow and define the issues of the parties so that each will know the opposing party's case, to prepare to meet it in advance and to marshal the necessary evidence at trial to establish its claim and answer the defence of the opposing party. The underlying rationale is not only to prevent surprises as seemed to be the reasoning of the High Court, but is much more than just that.

[24] That classic, authoritative text on the rules of pleadings – Sir Jack Jacob & Ian S Goldrein, *Pleadings: Principles and Practice* - provides four "objects" of pleadings, and it will be worthwhile to quote the relevant passage:

> Pleadings - their dual object in summary. Pleadings serve a two-fold purpose:
>
> (a) First — To inform each party what is the case of the opposite party which he will have to meet before and at the trial; and
>
> (b) Secondly — Concurrently to appraise the Court what are the issues. The identity of the issues is crucial, not only for the purposes of trial, but also for the purposes of all the pre-trial interlocutory proceedings.
>
> The object of pleadings - in detail
>
> (a) First — To define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court...
>
> (b) Secondly — To require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial ...

A (c) Thirdly To inform the court what are the precise matters in issue between the parties which alone the Court may determine, since they set the limits of the action which may not be extended without due amendment properly made ...

... in *Blay v. Pollard and Morris* Scrutton L.J. said:

B Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitiled to take such
C a course ...

(d) Fourthly To provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and to constitute a permanent record of the
D issues and questions raised in the action and decided thereon so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them ... (at pp. 3 - 4 of the text (1990 ed.)

[25] As evident from the passage above, not only are the immediate
E litigants bound by the rules of pleadings, so is the court.

The Court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the Court to enter into any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by
F their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realm of speculation ... (*Esso Petroleum Co Ltd v. Southport Corporation* [1956] A.C. 218).

G **[26]** A decision based on an unpleaded case will as a rule occasion a failure of natural justice and will be liable to be set aside on appeal. It denies the litigant the right to present his case fully before the judge on the unpleaded issue before the decision is made by the court. A corollary to this principle is the following: it is not the duty of the court to make a case for a party when that party does not raise, or wish to raise, a point in the litigation. *Janagi v.*
H *Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196, states the position very clearly thus:

A judgment should be based upon the issues which arise in this suit. If such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a
I miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure.

[27] In our view, a claim for *quantum meruit* here related to more than a claim based on the legal effects of pleaded material facts; it was a cause of action in itself, which was substantive in nature and therefore required express pleading and the adduction at trial of a sufficient foundation of facts derived from evidence tendered through witnesses' testimony or relevant, cogent documentary evidence. It was too substantive to be subsumed under the blanket notion of it being based on material facts "writ large in the whole claim". By the same token, it was difficult to blandly accept that the "omnibus" prayer of "further or other relief" could supply the omission of an express pleading. Resort to the omnibus prayer would only make sense where the main claim was not dismissed, since after all this was for "further or other relief". In our opinion, the decision of the Federal Court in *Lim Eng Kay v. Jaafar Mohamad Said*, *supra*, cannot be so liberally read as to countenance a major breach or misapplication of fundamental rules of pleadings and the proper role of the court in our adversarial system of civil justice.

[28] There was likewise no basis for s. 71 to be applied, especially in the face of clear contractual provisions which made the appointment of the respondent as process designer dependent on further agreement during the post-award stage. Section 71 cannot be interpreted as providing a relief not intended by the parties. To quote this provision for the sake of completeness:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[29] As for the argument on implied term, to accept it would mean conflicting directly with the clear terms of cl. 10. As observed earlier, it is no function of the courts to improve the case for the contracting parties. If the result seems unfair to the respondent, the short answer to this shortcoming must be this: It is for a party such as the respondent to ensure by clear contractual provisions that its pre-award expanses and costs should be reimbursed or shared in whatever proportion it might think fair in the circumstances. It made a commercial decision by choice to agree to cl. 10 and cl. 2.1 in the co-operation agreement. It has to stand by it based on the principle of freedom of contract which is a foundation of our contract law.

Conclusion

[30] For the reasons stated above, we allowed the appeal with costs of RM10,000 to be paid by the respondent to the appellant. The judgment of the High Court was set aside. We further ordered the deposit to be refunded back to appellant.